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CPLR 3121: Section Supersedes Appellate Division Rules

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court refuted this argument by asserting that the insurer was the real party in interest at least to the extent of its coverage,[63] and that defendant could claim any medical payments made as an offset against damages.[64]

In disposing of the case the court issued a strong warning:

> the carrier will not be permitted to use its medical payments obligation as a means of clandestine discovery. . . . [W]hen a matter is in suit the carrier's representative has an obligation to deal with an adverse litigant only through his attorneys even though the subject be medical payments and nothing more.[65]

To do otherwise would be a violation of Canon 9 of the Canons of Professional Ethics.[66]

CPLR 3121: Section supersedes appellate division rules.

In *Pipers v. Rosenow*,[67] a medical malpractice action, the appellate division, second department, affirmed an order directing plaintiff to submit to a physical examination pursuant to CPLR 3121.[68] In so doing, the court concluded that the introductory paragraph and Part Four of its Rules which purports to preclude physical examinations and the exchange of medical reports in dental or medical malpractice actions has been superseded by CPLR 3121, which does not exclude such actions from the scope of its application.[69]

The second department's holding was foreshadowed by several lower court decisions [70] which correctly reasoned that, in the face of

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[63] *See* Thrasher v. United States Liab. Ins. Co., 19 N.Y.2d 159, 225 N.E. 2d 503, 278 N.Y.S.2d 793 (1967).

[64] *See* Moore v. Leggette, 24 App. Div. 2d 891, 264 N.Y.S.2d 765 (2d Dep't 1965), *aff'd*, 18 N.Y.2d 864, 222 NE.2d 737, 276 N.Y.S.2d 118 (1966).

[65] 56 Misc. 2d at 648, 289 N.Y.S.2d at 871.

[66] Canon 9 provides that a lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel.

[67] 30 App. Div. 2d 690, 292 N.Y.S.2d 63 (2d Dep't 1968).

[68] For a discussion of the scope of CPLR 3121 see *The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 122, 161 (1965).

[69] *See* 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3121 (1965).

[70] DeCastro v. City of New York, 54 Misc. 2d 1007, 284 N.Y.S.2d 281 (Sup. Ct. Kings County 1967); Mackey v. Holy Family Hosp., 52 Misc. 2d 770, 276 N.Y.S.2d 893 (Sup. Ct. Kings County 1967); Fiori v. Bay Ridge Sanitorium, Inc., 48 Misc. 2d 318, 264 N.Y.S.2d 421 (Sup. Ct. Kings County 1965). The first department courts have reached a similar conclusion. Sommers v. Federation of Jewish Philanthropies, 56 Misc. 2d 529, 289 N.Y.S.2d 96 (Sup. Ct. N.Y. County 1968).

a conflict between the Rules and the CPLR, the CPLR would govern.[71]

CPLR 3123: Court excuses failure to respond to notice to admit.

Under CPLR 3123, notice to admit, a party may serve his adversary with a written request to admit matters of fact so as to expedite the trial by eliminating the necessity of proving matters not in dispute.[72] If no reply is made within twenty days, or at a time set by the court, the matters contained in the notice to admit are deemed admitted. If the answering party finds it difficult to categorically admit or deny, he can so state in a sworn statement specifying his claim.[73] Under subdivision (b) a party may apply to the court to amend or withdraw his admission,[74] and any admissions made are subject to all pertinent objections to admissibility which may be interposed at trial.

In *Marguess v. City of New York*,[75] defendant city failed to respond to plaintiff's notice to admit but, the appellate division, first department, nevertheless affirmed dismissal of the complaint. Relying heavily on that portion of subdivision (b) which allows an objection to admissibility to be made, the majority excused the defendant's total failure to respond on the ground that plaintiff's demands, relating to questions of ultimate liability, were not attuned to any reasonable belief that they were free from substantial dispute, and thus, admissible matter.[76]

The dissent interpreted the provisions of 3123 to mean that defendant's failure to respond to the notice to admit established a prima facie case against it. Deeming the trial court to lack the power to excuse a total failure to comply with the demand, subdivision (b) was construed as intended merely to reserve for the trial court questions as to relevancy, materiality and competency of

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[71] CPLR 101 states that the CPLR "govern[s] the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute."

[72] *In re* Collins, 31 Misc. 2d 754, 222 N.Y.S.2d 89 (Surr. Ct. N.Y. County 1961); WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 264 (2d ed. 1966).

[73] *See* Sidclair Realty Co. v. Schor, 95 N.Y.S.2d 839 (App. T. 1st Dep't 1950); *In re* Luckenbach, 196 Misc. 782, 96 N.Y.S.2d 244 (Surr. Ct. Kings County 1949); Solof v. City of New York, 181 Misc. 956, 49 N.Y.S.2d 921 (App. T. 2d Dep't 1944).

[74] CPLR 3103 is also applicable to 3123 so that the answering party can attack the notice to admit in this way. *See The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 436, 455-56 (1968).

[75] 30 App. Div. 2d 782, 291 N.Y.S.2d 956 (1st Dep't 1968).

[76] *See In re* Kelly, 33 Misc. 2d 16, 19, 225 N.Y.S.2d 896, 898 (Surr. Ct. N.Y. County 1962).